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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

CORPORATION FOR PUBLIC BROADCASTING,  
NATIONAL ASSOCIATION OF PUBLIC TELEVISION STATIONS,  
AND PUBLIC BROADCASTING SERVICE,  
*Petitioners.*

v.

- CENTURY COMMUNICATIONS CORP., et al., -

*Respondents.*

**PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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## QUESTIONS PRESENTED

This case involves a challenge on First Amendment grounds to rules adopted by the Federal Communications Commission ("FCC" or "Commission") requiring, for a period of five years, that cable systems with 20 or more channels devote a portion of their channels to carrying local television stations and that all cable television systems carry at least one local public television station. These rules were adopted, *inter alia*, to advance the long-standing and substantial governmental interests in facilitating viewers' access to a diversity of program sources and, in particular, assuring nationwide availability of public television service. The United States Court of Appeals for the District of Columbia Circuit invalidated the rules, finding that the Commission had not met the evidentiary burden imposed by this Court's decision in *United States v. O'Brien*, 391 U.S. 367 (1968).

The questions presented are:

1. Whether the court below properly applied the standards set forth in *United States v. O'Brien, supra*, and its progeny when it imposed an unreasonably heavy evidentiary burden on the FCC to demonstrate that the rules requiring carriage of local television stations, including public television stations, are essential to preserve viewers' access to those stations for a five-year period.

2. Whether the court below substituted its judgment for that of the FCC in a manner inconsistent with the holdings of this Court when it held that the need for rules to assure viewers of continued access to local television stations was "more speculative than real."

## LIST OF PARTIES

In addition to the Petitioners and Respondents, the parties participating in the proceedings in the United States Court of Appeals were: Century Communications Corporation; Chasco Cablevision, Ltd.; Clearview Cablevision Associates II; Columbia Associates, L.P.; Daniels & Associates, Inc.; Landmark Cablevision Associates; Monmouth Cablevision Associates; Masada Communications, Inc.; National Cablesystems, Inc.; OCB Cablevision, Inc.; Ocean Associates; Riverview Cablevision Associates; St. Charles CATV, Inc.; United Cable Television Corp.; Association of Independent Television Stations; Spanish International Communications Corp.; Univision, Inc.; The National Association of Broadcasters; Lincoln Broadcasting Co.; National Cable Television Association; Office of Communications of the United Church of Christ; National Broadcasting Co, Inc.; Richard S. Leghorn; Hubbard Broadcasting, Inc.; and the National Independent Television Committee.

None of the Petitioners has any parent companies, subsidiaries, or affiliates.

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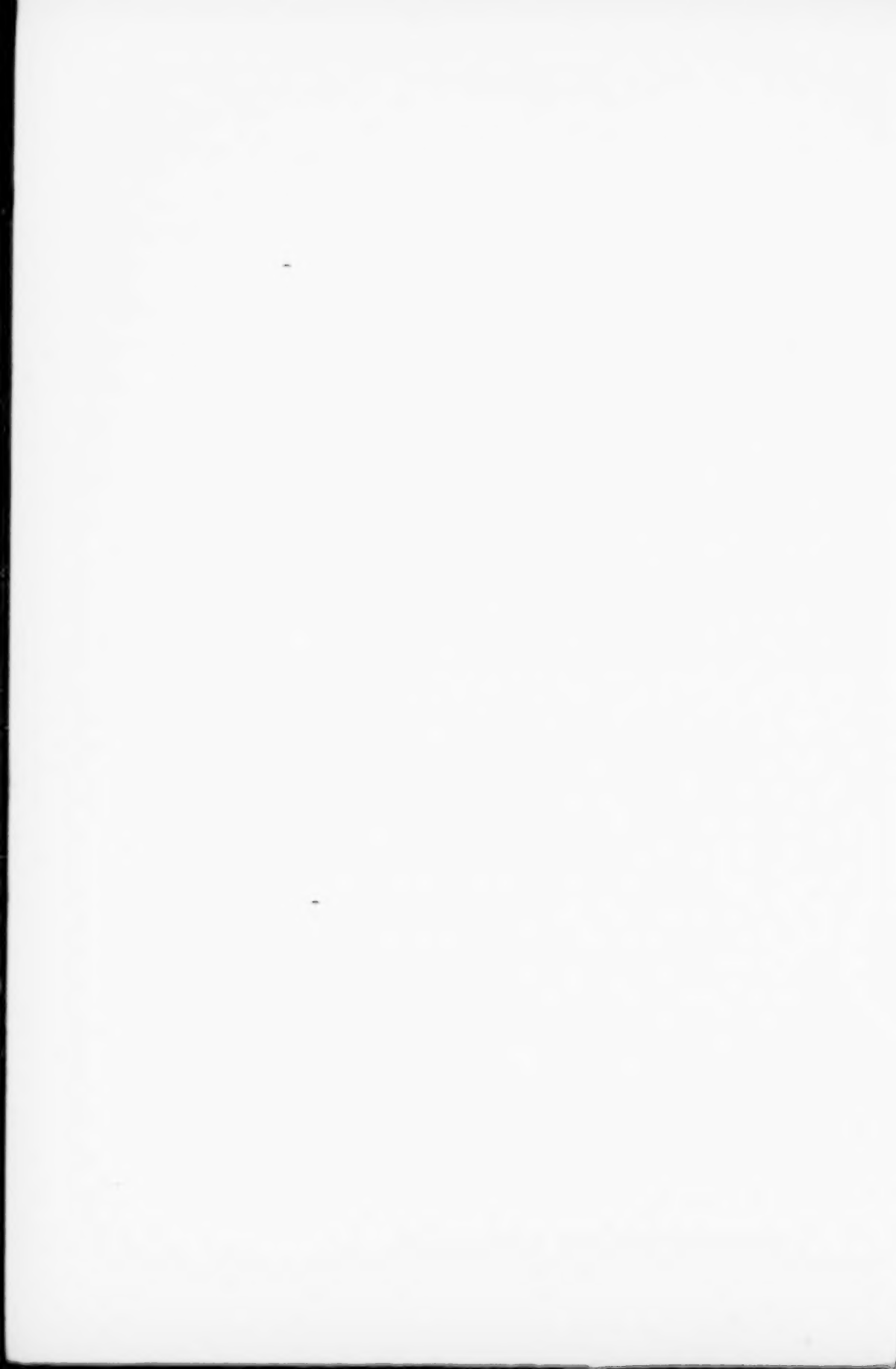
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Petitioners are the national public television organizations. The Corporation for Public Broadcasting is a private, nonprofit corporation whose creation was authorized by the Public Broadcasting Act of 1967 and which is financed primarily by federal appropriations to support the nation's public broadcasting system. The National Association of Public Television Stations ("NAPTS") and the Public Broadcasting Service ("PBS") are private nonprofit membership organizations whose members are licensees of virtually all of the nation's public television stations. NAPTS supports planning, research and representational activities on behalf of its members. PBS is the national program distribution arm of the nation's public television stations, providing distribution and other program-related services to its members. Petitioners were Intervenor below, sup-

porting the FCC's rules requiring cable carriage of public television stations.

### OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987) ("*Century Communications*").<sup>1</sup> That opinion reviewed the FCC's decisions in *Amendment of Part 76 of the Commission's Rules Concerning Carriage of Broadcast Signals by Cable Television Systems*, 1 F.C.C. Rcd 864 (1986) ("*Report and Order*") (J.A. 32a-204a), *recon. denied*, 2 F.C.C. Rcd 3593 (1987) ("*Reconsideration Order*") (J.A. 205a-330a).<sup>2</sup>

### JURISDICTION

The judgment of the Court of Appeals was released on December 11, 1987. This Court has jurisdiction under 28 U.S.C. § 1254(1) (Supp. III 1982).

<sup>1</sup> Joint Appendix 1a-28a (hereinafter, "J.A. \_\_\_\_"). The Court issued an *Order* on January 29, 1988 clarifying the scope of its holding. On February 24, 1988, Century Communications Corp., *et al.*, filed a Petition for Rehearing of the January 29 *Order*. That petition is still pending.

<sup>2</sup> These Commission decisions followed the decision in *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) ("*Quincy Cable TV*"), which invalidated the mandatory carriage rules adopted by the FCC in 1966. Those rules required cable systems to carry virtually every local television station without regard to the financial condition of stations entitled to carriage, the size of the cable system, the program preferences of cable subscribers, or any other factor affecting the stations' need for carriage or the burden imposed on the cable operator. The court held that the rules were invalid under the First Amendment because they were too broad, 768 F.2d at 1460-62, and because the FCC had never demonstrated by substantial evidence the need for those rules, relying instead on its intuitive judgment that mandatory carriage rules were needed to protect local broadcasters from diversion of their audience by cable systems. *Id.* at 1457-59.

## AGENCY REGULATIONS INVOLVED

The FCC regulations invalidated by the Court of Appeals are set forth in the Statutory Appendix attached to this Petition. They are codified at 47 C.F.R. §§ 76.5, 76.55-76.62, 76.64 (1987).

## STATEMENT OF THE CASE

This case presents the issue of whether the court below improperly substituted its judgment for that of the Commission and improperly applied *United States v. O'Brien*, *supra*, when it imposed an unreasonably heavy evidentiary burden on the FCC to justify its rules requiring certain cable television systems to devote a portion of their capacity to the carriage of local television stations for a five-year period. The rules were adopted to assure the public's continued access to the diversity of programming offered by local television stations, including public television stations, during the transition to a deregulated marketplace in which the FCC anticipated cable operators and broadcasters would compete for viewers. *Report and Order* at ¶ 134 (J.A. 105a).

The rules provided, in essence, that cable television systems with 20 or more channels would devote up to 25% of their channels to carriage of local television stations.<sup>3</sup>

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<sup>3</sup> Specifically, the rules required cable operators with 20-29 channels to devote up to 7 channels, and cable systems with 30 or more channels to devote up to 25% of their channels, to the carriage of "qualified" local television stations. 47 C.F.R. § 76.56 (1987). "Qualified" local stations were defined as those that are licensed to a community within 50 miles of the cable system and that attract a specified percentage of television viewers. 47 C.F.R. § 76.5 (1987). Public television stations were exempted from the viewing standard in light of their mandate to present alternative programming that frequently attracts discrete rather than mass audiences, and new commercial stations were given one year to satisfy the viewing standard. *Report and Order* at ¶ 117 (J.A. 95a); *Reconsideration Order* at 47 C.F.R. §§ 131-141 (J.A. 287a-294a). Compare 47 C.F.R. § 76.5(1)(i) with 47 C.F.R. §§ 76.5(1)(ii) and 76.5(2) (1987).

Because of the substantial governmental interest in assuring viewers of access to public television stations and the heightened need of those stations for cable carriage to reach their communities, the Commission adopted special rules for public television. Those rules required all cable systems, regardless of channel capacity, to carry at least one local public television station and systems with 54 or more channels to carry at least two. *Report and Order* at ¶ 117 (J.A. 95a-96a); *Reconsideration Order* at ¶ 66 n.31, ¶ 134 (J.A. 245a, 289a-290a). Cable systems were required to carry additional local public television stations if they did not otherwise fill up their "must-carry" quota. *Reconsideration Order* at ¶ 134 n.67 (J.A. 289a).<sup>4</sup>

The must-carry rules adopted by the FCC were to remain in place for five years, at which point the FCC planned to review them to determine if they were still necessary to protect the public's ability to receive local television stations. *Report and Order* at ¶ 137 (J.A. 110a). The FCC also required cable systems to inform their subscribers of the need to acquire antennas and input selector, or "A/B," switches to receive local television stations not carried by the cable system. *Report and Order* at ¶¶ 140-42 (J.A. 112a-114a); *Reconsideration Order* at ¶¶ 95-101 (J.A. 266a-270a). These "educational" portions of the rules were to continue in effect even after the must-carry requirements expired.<sup>5</sup>

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<sup>4</sup> In contrast, cable systems were only required to carry one local station affiliated with a commercial television network in each market.

<sup>5</sup> Cable operators were required to inform their subscribers semi-annually that (1) cable systems are not required to carry all local television stations, (2) in five years they would not be required to carry any local television stations, and (3) an antenna system and an A/B switch would be necessary for cable subscribers to watch programs offered by local stations that are not carried on the cable system. Cable operators were also required to identify any local television stations not carried by their system, and to provide information about A/B switches. 47 C.F.R. § 76.66 (1987). The decision below did not invalidate

The FCC found that, since 1966, when it adopted the must-carry rules invalidated in *Quincy Cable TV*, *supra*, cable had matured from a service that was ancillary to broadcasting to an independent media voice. *Report and Order* at ¶ 114 (J.A. 93a). Thus, it concluded that the basis on which the 1966 rules had rested—the protection of local broadcasting—was no longer appropriate but that there was a substantial federal interest in “maximizing the choices of television programming available to viewers.” *Id.* at ¶ 115 (J.A. 94a). It also concluded that the First Amendment required that the need to preserve viewer access to local television programming must be balanced against the impact of any rules designed to further that goal on cable operators’ and cable programmers’ First Amendment rights. *Id.* at ¶ 120 (J.A. 97a-98a).

Since cable subscribers were accustomed to their cable systems carrying *all* local television stations and since many cable systems had, in marketing their services, represented that subscribers would no longer need antennas to receive local stations, the FCC concluded that the public was under a “misperception” that cable systems would always carry all local stations. *Report and Order* at ¶¶ 121-134 (J.A. 98a-109a). To protect the substantial governmental interest in assuring continued viewer access to local television programming, particularly public television programming, the FCC required cable operators to devote some of their channels to local television stations until cable subscribers become accustomed to the need to install antenna systems and A/B switches. *Id.* at ¶ 136-39 (J.A. 109a-112a). Estimating that this transition would take about five years, the FCC imposed must-carry requirements for that period. *Id.* at ¶ 137 (J.A. 110a).

The special cable carriage protection that the FCC accorded public television stations reflects the long-standing

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these educational aspects of the rules. See *Century Communications Corp. v. FCC*, No. 86-1683 (D.C. Cir. Jan. 29, 1988) (order clarifying opinion issued Dec. 11, 1987) (J.A. 29a-31a). But see note 1 *supra*.

recognition by the FCC and Congress of public television's unique role. *Report and Order* at ¶ 117 (J.A. 96a); *Reconsideration Order* at ¶¶ 134, 137-38 (J.A. 289a-293a). The Commission has long recognized that public television's mission is to provide an alternative to the mass audience programming offered by commercial stations. It reserved channels exclusively for noncommercial educational use because it believed that noncommercial educational entities, insulated from the commercial imperative to program exclusively for mass audiences, would enhance the diversity of programming made available to the public and would be able to serve discrete audiences with special needs and interests.<sup>6</sup>

To enable public broadcasting to fulfill that role, Congress has authorized \$1.5 billion for educational broadcasting facilities and programming over the past twenty-five years.<sup>7</sup> Federal assistance has enabled public television to expand its coverage to most of the country and provide quality programming produced for educational and other noncommercial purposes, in contrast to the programming offered by commercial television, which is designed to garner the highest possible audience ratings so that it will generate the most advertising revenue. The Commission found that cable carriage of public television stations is

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<sup>6</sup> See *Sixth Report and Order on Television Assignments*, 41 F.C.C. 148, 159-62 (1952). See also *id.* at 582 (Comm'r Hennock concurring in part and dissenting in part). See generally Carnegie Commission on Educational Television, *Public Television: A Program for Action* (1967).

<sup>7</sup> See Educational Television Act of 1962, Pub. L. No. 87-447, 76 Stat. 64 (1962); Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365 (1967); Public Broadcasting Financing Act of 1975, Pub. L. No. 94-192, 89 Stat. 1099 (1975); Public Telecommunications Financing Act of 1978, Pub. L. No. 95-567, 92 Stat. 2405 (1978); Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (1981); Federal Communications Commission Authorization Act of 1983, Pub. L. No. 98-214, 97 Stat. 1467-69 (1983); Consolidated Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-272, 100 Stat. 117 (1986).

essential if they are to continue fulfilling their unique role and achieve Congress' objective of reaching as much of the population as possible. *Report and Order* at ¶ 117 (J.A. 95a-96a); *Reconsideration Order* at ¶¶ 67 n.31, 134 (J.A. 245a, 289a-290a).

The court below did not challenge the importance of the governmental interests in maximizing program diversity or in assuring nationwide availability of public television service. *Century Communications* at 300 (J.A. 18a). Nonetheless, it invalidated the rules on the grounds that, "as in *Quincy Cable TV*, the FCC's judgment that transitional rules are needed is predicated not upon substantial evidence but rather upon several highly dubious assertions of the FCC, from which we conclude that the need for a new saga of must-carry rules is more speculative than real." *Id.* The court concluded that, because the new rules affected First Amendment interests, the "substantial deference" normally accorded administrative agencies had "little relevance" to the rules at issue here. *Id.* at 299 (J.A. 16a). Purporting to apply *United States v. O'Brien*, *supra*, it therefore held that the FCC had a heavy burden of demonstrating by substantial evidence that the rules were essential to protect the governmental interest in assuring the public's access to the maximum diversity of program sources and that the rules were the least intrusive means of achieving that objective.<sup>8</sup>

Applying that test, it found "scant evidence" that cable subscribers were under the "misperception" that cable systems would always carry local stations and faulted the FCC for not supporting that conclusion with studies of subscriber expectations. *Century Communications* at 300

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<sup>8</sup> The court below had jurisdiction over this case pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342 (Supp. III 1982).

(J.A. 19a).<sup>9</sup> Further, the court accorded no weight to the Commission's predictive judgment that it would take approximately five years to effect an orderly transition to a competitive marketplace, even though the FCC is the expert agency on such matters. Rather, relying on its own observations of consumer behavior, the court stated that "we simply cannot accept, without evidence to the contrary, the sluggish profile of the American consumer that the Commission's argument necessarily presupposes." *Id.* at 302 (J.A. 24a). It also ignored the FCC's finding that some additional technical work was needed in the design and manufacturing of A/B switches before certain technical problems could be solved. *Report and Order* at ¶ 165 (J.A. 128a).

While the court subjected the evidentiary support for the new rules to exacting scrutiny in order to protect cable operators' First Amendment rights, it failed to devote equal attention to the public's First Amendment interest in access to diverse program sources or to the long-standing governmental interest in fostering local broadcast outlets and, in particular, a vigorous public television system. *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984); 47 U.S.C. § 307(b). *See also* notes 21 and 26 *infra*. The court thus effectively concluded, although it did not expressly so hold, that cable operators' interest in selecting the programming offered to their subscribers outweighs both the First Amendment interests of the public in access to diverse programming from *all* sources and the policy fostering local broadcast outlets. Yet the same court, in its decision in *Quincy Cable TV*, recognized that

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<sup>9</sup> The court rejected the Commission's reliance on a study submitted by the National Association of Broadcasters that demonstrated the extent to which cable subscribers lacked the antenna systems necessary to receive stations not carried by their cable systems, concluding it "provides only the spongiest of foundations for the FCC's asserted justification for its regulations." *Id.* at 300-302 (J.A. 20a-23a).

cable's control over the programming made available to subscribers could impair the viability of broadcast stations, and that "the complete displacement of expressive outlets attuned to the needs and concerns of the communities they serve not only would contravene a long-standing historical tradition of locally oriented press but might itself disserve the objective of diversity." 768 F.2d at 1462.

The court below also completely ignored the unique considerations applicable to public television, even though the petitioners filed a brief addressing those issues. As petitioners showed, the FCC found in its *Report and Order* and *Reconsideration Order* that public television plays a unique role in the American broadcast system, and that its continued fulfillment of that role, which reflects long-standing congressional and FCC policies, required special cable carriage protection for public television stations. See *Report and Order* at ¶ 117 (J.A. 96a); *Reconsideration Order* at ¶¶ 131-41 (J.A. 289a-293a). The court nonetheless invalidated the rules requiring carriage of public television stations as if they had no justification other than that applicable to commercial stations.

### REASONS FOR GRANTING THE WRIT

In the decision below, the court has, for the second time in two years, struck down as violative of the First Amendment FCC regulations requiring cable systems to carry certain local television stations. In so doing, the court has frustrated realization of long-standing congressional and FCC goals fundamental to federal regulation of the communications industry: facilitating viewers' access to a diversity of program sources; fostering a system of local television outlets; and, in particular, promoting the development of a nationwide system of local public television stations that provides "a form of television service that is not subject to the same marketplace forces as commercial broadcast and cable television." *Report and Order* at ¶ 117 (J.A. 96a).

The court's decision represents an abrupt departure from this Court's decisions establishing the standards by which regulations incidentally affecting free expression should be judged; it effectively subjected the FCC's rules to the exacting scrutiny required where regulations directly affect speech. The decision is also at variance with decisions of this Court concerning the proper role of the judiciary in reviewing regulations that incidentally affect speech. Indeed, it carves out a new role for the federal judiciary in reviewing administrative agency decisions with potentially far-reaching consequences for the administrative process.

It is imperative that this Court review the errors in the decision below because, if allowed to stand, it will obstruct achievement of important federal regulatory and policy objectives, including those specifically supporting public television. The decision also seriously undermines the FCC's ability to balance, under the regulatory scheme of the Communications Act, the First Amendment interests of broadcasters, cable operators, and the viewing public, and imperils, in the name of the First Amendment, the well-established policy protecting the public's First Amendment interest in receiving a diversity of ideas from a multiplicity of sources. See, e.g., *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

For these reasons, petitioners submit that there is a compelling need for the Court to review the decision below.<sup>10</sup>

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<sup>10</sup> The need for this Court's review is far more compelling than was the need for such review of *Quincy Cable TV*, *supra*, which struck down the FCC's original must-carry rules two years ago. In *Quincy Cable TV*, the court invalidated the FCC's must-carry rules, adopted two decades earlier, on the grounds that the FCC had "never reconsidered or seriously questioned the elaborate and concededly speculative premises on which its economic defense of the rules rests," and that the rules were overbroad and drafted with little attempt to accom-

**I. The Unreasonably Rigorous Burden of Proof Imposed by the Court of Appeals Is Inconsistent with the Standard Articulated by this Court in *United States v. O'Brien*.**

The court below did not find it necessary to decide the precise level of First Amendment protection due cable operators because it concluded that the new must-carry rules failed to satisfy even the relatively lenient standard established in *United States v. O'Brien, supra*, for scrutiny of regulations incidentally burdening speech. In *O'Brien*, this Court stated:

[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

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modate cable operators' First Amendment rights. 768 F.2d at 1442, 1460-62. The court invited the FCC to "recraft the rules in a manner more sensitive to the First Amendment concerns" expressed by the court. *Id.* at 1463. At the time the petition for certiorari was pending before this Court, the FCC had before it several petitions for rule-making requesting the adoption of new must-carry rules. This Court's review of *Quincy Cable TV* would thus have been premature because it appeared that the FCC might well adopt new rules.

The FCC has now completed its comprehensive rulemaking proceeding in which over 170 parties from all affected sectors of the communications industry participated, and in which it took great pains to accommodate cable companies' First Amendment rights. *See Report and Order* at ¶¶ 160-72 (J.A. 125a-132a). With these modest new must-carry rules invalidated by a decision imposing an impossibly rigorous burden of proof, this case is ripe for review by this Court.

The court below did not question the importance of the governmental interests cited by the FCC as necessitating the interim rules: promoting maximum diversity in program choices available to the public and furthering the development of public television service. *Report and Order* at ¶¶ 121-34 (J.A. 98a-106a). Indeed, the Court could hardly challenge the governmental interest in promoting diverse program sources, given this Court's repeated, explicit, and recent recognition of its importance. *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984) ("[t]here can be little doubt" that the FCC's must-carry rules "reflect an important and substantial federal interest" by protecting noncable households from loss of local television service and increasing the diversity of programming available to viewers); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981) (deeming the "policy of promoting the widest possible dissemination of information from diverse sources to be consistent with both the [FCC's] public-interest standard and the First Amendment"); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978).

Rather, the court concluded that the FCC's judgment that must-carry rules are needed for a five-year period was not based on "substantial evidence." *Century Communications* at 300 (J.A. 18a). The court reached that conclusion based not on a review of the record as a whole to determine whether there was a reasonable basis for the FCC's conclusions, but rather on a hypercritical scrutiny of the evidentiary support for each and every FCC finding. Specifically, the court took issue with the FCC's conclusions that (1) there is a widespread misperception among cable subscribers that their only means of access to television programming is through their cable system, and (2) it will take five years to educate consumers concerning the need for antennas and A/B switches to receive television signals over-the-air and to allow them sufficient time to install such equipment. *Id.* at 300-05 (J.A. 18a-29a).

The court also criticized the FCC's "assumption" that cable companies would drop local television stations in the absence of must-carry rules, *Century Communications*, 835 F.2d at 303 (J.A. 24a-25a)—an assumption supported by evidence in the record that some cable systems had ceased carrying some television stations following the court's invalidation of the prior must-carry rules in *Quincy Cable TV. Report and Order* at ¶ 131 (J.A. 104a). The court discounted the FCC's judgment that cable operators' conduct during the pendency of its rulemaking was not a reliable indicator of their future willingness to carry local television stations, given the restraining effect of the pending rulemaking, the appeal of the *Quincy* decision to this Court, and warnings by the National Cable Television Association. *Century Communications*, 835 F.2d at 303 (J.A. 25a-26a).<sup>11</sup> The court found instead that the FCC should have given more weight to conclusions reached by the Department of Justice and the Federal Trade Commission that the absence of must-carry rules would not harm local television, *id.*, even though the FCC, not the FTC or the Justice Department, is the expert agency charged by Congress with assuring the availability of a nationwide system of local broadcast stations. *See* 47 U.S.C. § 150 (Supp. III 1982).

Finally, the Court essentially ignored the FCC's rationale that the need for improvement in input selector switch technology justified continuation of the must-carry rules for five years. *See Report and Order* at ¶ 165 (J.A. 128a);

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<sup>11</sup> The cable industry was also well aware that members of Congress with responsibility for oversight of the agency had communicated to the FCC their concerns regarding the continued need for must-carry regulations following the *Quincy Cable TV* decision. *See, e.g.*, Cablevision, September 23, 1985, at 11; Cablevision, September 30, 1985, at 12; Cablevision, August 4, 1986, at 63. *See also Report and Order* at ¶ 28 and n.53 (J.A. 48a-49a).

*Reconsideration Order* at ¶ 62 (J.A. 241a-242a).<sup>12</sup> It also ignored the FCC's explanation that the five-year period would give the agency an opportunity to observe the transitional cable and broadcast marketplace to determine whether it should, in a subsequent rulemaking, extend must-carry regulation in particular instances after the expiration of the five-year period. *See Report and Order* at ¶ 75 (J.A. 73a).

This exacting scrutiny by the court, and its rejection of the FCC's conclusions whenever it disagreed with the FCC's findings or rationales, imposed an unreasonably rigorous burden on the FCC and is inconsistent with holdings of this Court applying *United States v. O'Brien*, *supra*. Those decisions, as shown below, require the courts to afford agencies reasonable latitude to determine the need for regulation and the appropriate regulatory approach for meeting those needs, even when First Amendment rights are incidentally affected. *See, e.g., City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *United States v. Albertini*, 472 U.S. 675 (1985); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

This Court has recognized that governmental objectives such as diversity of program sources are not easily defined

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<sup>12</sup> The Court mischaracterized the FCC's conclusion in this regard, stating that the FCC had found broadcasters' concerns about the technical adequacy of input selector switches "overstated." *Century Communications*, 835 F.2d at 302-03 n.5 (J.A. 24a). In fact, the FCC found that "many of these concerns are overstated and that the rest can be mitigated or resolved by development and improvement of new and existing input selector switches to meet particular needs." *Report and Order* at ¶ 165 (emphasis added) (J.A. 128a). It then specifically cited as one reason for its decision to enforce the rules for five years its "recognition that there may be room for improvement in the technology of input selector switches." *Id.* *See also Reconsideration Order* at ¶ 62 (J.A. 241a-242a).

or measured, and that the FCC, in seeking to foster such diversity, is "entitled to rely on its judgment, based on experience" that particular measures will advance its goal of diverse programming. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 797 (1978). When factual determinations by the FCC are primarily of a judgmental or predictive nature, as they were in this case, this Court has acknowledged that "complete factual support in the record for the Commission's judgment or prediction is not possible or required . . . ." *Id.* at 814. Rather, "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency." *Id.* at 814, quoting *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961).<sup>13</sup>

This Court, applying *O'Brien*, recently reaffirmed this principle in *City of Renton v. Playtime Theatres, Inc.*, *supra*. In that case, the Court reversed a Ninth Circuit decision invalidating a zoning ordinance as violative of the First Amendment on the grounds that the city's justifications for the ordinance were "conclusory and speculative." This Court held that the court of appeals had imposed an "unnecessarily rigid burden of proof" on the city, notwithstanding the First Amendment interests at stake:

The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reason-

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<sup>13</sup> In *National Citizens Committee for Broadcasting*, the Court held that the FCC's fear that local ownership of broadcast stations would decline if the FCC required divestiture of existing newspaper/broadcast combinations was "grounded in a rational prediction, based on its knowledge of the broadcasting industry and supported by comments in the record . . . ." 436 U.S. at 808. The same can be said of the FCC's judgment in this case that must-carry rules are needed to assure continued viewer access to diverse program sources.

*ably believed to be relevant to the problem that the city addresses.*

475 U.S. at 51 (emphasis added).

The court below held the FCC to a much higher standard of proof than that required by this Court's decisions. The FCC found that empirical data were sparse concerning the effects on local signal carriage of abruptly discontinuing the must-carry rules. Moreover, it concluded that such data could not, in any event, provide an accurate forecast of such effects, given the changing competitive incentives of cable operators resulting from the introduction of new satellite programming services and their increasing efforts to sell time to local advertisers, in competition with local broadcasters. *Report and Order* at ¶¶ 39, 133 and n.159 (J.A. 54a-55a, 105a, 149a); *Reconsideration Order* at ¶¶ 68-69 (J.A. 245a-247a). Therefore, the FCC justifiably based its decision to adopt modest must-carry rules on available evidence demonstrating cable subscribers' failure to maintain off-the-air reception capability, the nationwide level of cable penetration,<sup>14</sup> competitive incentives of cable companies not to carry local television stations, evidence that cable systems had ceased carriage of some television stations following invalidation of the prior must-carry rules, and the need for improvement in input selector switch technology.

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<sup>14</sup> Cable systems presently serve approximately 50% of the nation's television households and in some communities as much as 80 to 90% of the television households subscribe to cable service. In the vast majority of these cases, cable subscribers are completely dependent on the cable system for television programming, either because they have dismantled their own antenna systems or because the terrain, natural or man-made, prevents adequate off-the-air reception of even local stations.

Furthermore, cable carriage affects a television station's ability to serve not only cable subscribers, but nonsubscribers as well, because exclusion from the cable system may significantly undermine a station's financial base.

As required by *City of Renton*, the agency relied upon evidence reasonably believed to be relevant to the problem it addressed. And, as permitted by *National Citizens Committee for Broadcasting*, it made a rational forecast of how best to promote diversity of programming and preserve the viability of local television stations in the absence of conclusive evidence of cable company or viewer behavior in a post-must-carry environment. The court's imposition of a more rigorous burden of proof on the FCC is inconsistent with these Supreme Court precedents; the court, in effect, subjected the FCC's rules to the exacting scrutiny required where regulations directly affect speech.<sup>15</sup>

## II. The Court of Appeals Erred in Substituting Its Judgment for that of the FCC on Critical Communications Policy Issues.

Dissatisfied with the record relied upon and the judgments made by the FCC in adopting new must-carry rules, the court below substituted its own judgment regarding the need for such rules. Indeed, the court explicitly eschewed any obligation under this Court's precedents to defer to the FCC's judgments on critical communications policy issues on the grounds that the regulations at issue incidentally burdened free expression. *Century Communications*, 835 F.2d at 299 (J.A. 16a).<sup>16</sup>

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<sup>15</sup> Compare *Century Communications*, *supra*, with *Arkansas Writers' Project, Inc. v. Ragland*, \_\_\_ U.S. \_\_\_, 107 S. Ct. 1722, 1728-29 (1987) (state sales tax imposed selectively on magazines based on content violated First Amendment where state failed to sustain its heavy burden of demonstrating that law served a compelling state interest and was narrowly drawn to achieve that end) and *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786-92 (1977) (state statute prohibiting corporations from spending funds to support or oppose referenda did not withstand "exacting scrutiny" necessary to sustain it under First Amendment where governmental interests asserted by state were not adequately supported by record or legislative findings).

<sup>16</sup> The court below cited several decisions of this Court to support its assertion that "the Supreme Court has often noted that the sub-

Specifically, the court questioned the FCC's judgment that it will take five years to effect an orderly transition to a competitive marketplace. *Century Communications* 835 F.2d at 301-02 (J.A. 22a-24a). Based on the judges' own observations concerning consumer acceptance of other electronic devices, the five-year period adopted by the FCC appeared to the court a "strikingly long" time for consumers to learn of, purchase, and install the requisite equipment to receive television broadcast programming. *Id.* at 302, 304 (J.A. 24a, 26a-28a). And the court disclaimed any obligation to defer to the agency's judgment regarding what it considered a matter simply of "consumer instincts" as to which the FCC has no special expertise. *Id.* at 304 (J.A. 26a-28a).<sup>17</sup> The court also rejected the FCC's judgment that there was a substantial risk that cable companies would drop local stations in the absence of must-carry rules. *Id.* at 303 (J.A. 25a).

The court's refusal to afford the FCC any latitude to exercise its expert judgment in addressing issues manifestly within its sphere of expertise is inconsistent with the substantial body of this Court's decisions requiring

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stantial deference due in the administrative context has little relevance when first amendment freedoms are even incidentally at stake." *Century Communications*, 835 F.2d at 299 (J.A. 16a). Those decisions establish that the government must demonstrate, under *United States v. O'Brien*, *supra*, that regulations incidentally burdening speech further a substantial governmental interest and are no more intrusive than necessary to further that interest, and that a reviewing court may not simply assume that to be the case. Contrary to the court of appeals' suggestion, however, those decisions do not suggest that it is appropriate for a reviewing court to subject regulations that incidentally burden speech to exacting scrutiny or to substitute its judgment for that of the agency.

<sup>17</sup> The court below ignored the fact that there were reasons why the FCC chose to keep the rules in effect for five years quite aside from consumer sluggishness in learning of and installing switches and antennas. See *Report and Order* at ¶ 165 (J.A. 128a); *Reconsideration Order* at ¶¶ 62, 75 (J.A. 241a-242a, 250a-251a).

judicial deference to expert agency judgments, even where the governmental action at issue incidentally burdens free expression. While it is true that, where regulations implicate First Amendment interests, the reviewing court must examine whether they further a governmental interest of sufficient importance to justify the burden on First Amendment rights, the degree of deference appropriately accorded the agency's judgment depends upon whether the regulations directly affect speech or only incidentally burden it. Precedents of this Court make it clear that the more exacting scrutiny required of regulations directly affecting speech is inappropriate when the burden on speech is incidental, as it is here.<sup>18</sup>

For example, in *Clark v. Community for Creative Non-Violence, supra*, this Court reversed the District of Columbia Circuit's *en banc* determination that Department of Interior regulations prohibiting camping in certain parks violated the First Amendment when applied to prohibit demonstrators from sleeping in parks to dramatize the plight of the homeless. This Court held that the camping proscription served a substantial governmental interest in conserving park property. The Court rejected the court of appeals' view that the regulation was invalid because there were less speech-restrictive measures that could have served the government's interest, such as limiting the size, duration, or frequency of demonstrations:

*[T]hese suggestions represent no more than a disagreement with the Park Service over how much protection the core parks require or how an acceptable level of preservation is to be attained.*

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<sup>18</sup> See note 15 *supra*. As the Commission properly concluded, its must-carry regulations are not designed to favor or burden any particular viewpoints, but rather to achieve a content neutral purpose—fostering a diversity of programming—and thus need satisfy no more stringent a test than that set forth in *United States v. O'Brien, supra*. Report and Order at ¶¶ 188-189 (J.A. 145a-146a).

We do not believe, however, that either *United States v. O'Brien* or the time, place, or manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.

468 U.S. at 299 (emphasis added).

Similarly, in *City of Renton v. Playtime Theatres, Inc.*, *supra*, this Court found no constitutional defect in the method chosen by the city to protect residential neighborhoods from the secondary effects of adult theatres. The Court stated that it was not an appropriate judicial function to appraise the wisdom of the city's decision to further its substantial interests in one way—there, by concentrating adult theatres in certain areas—rather than another, such as by dispersing adult theatres. The Court stated that “the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.” 475 U.S. at 52, quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (emphasis added).

And, in *United States v. Albertini*, *supra*, this Court held that the validity of a particular regulation “does not turn on a judge's agreement with the responsible decision maker concerning the most appropriate method for promoting significant government interests,” even where the regulation burdens the exercise of First Amendment rights. *Accord*, *Members of City Council v. Taxpayers for Vincent*, *supra* at 795-804, 807; *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 654-55 (1981); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 803(1978).

Contrary to the principle firmly established in these cases, the court below denied the FCC any freedom to

experiment with solutions to admittedly serious problems associated with the power of cable systems to control viewer access to local television stations. Rather, in an opinion stunning for its rigidity, it struck down the FCC's efforts to enact a modest regulatory program designed to preserve a competitive environment for television programming while the Commission has an opportunity to assess the effects of its A/B switch and consumer education requirements. The court's usurpation of the FCC's authority to regulate the communications industry and its substitution of its judgments for those of the FCC are inconsistent with this Court's precedents.

The court's refusal to afford the FCC any latitude to exercise its judgment, as required by this Court's decisions, is particularly intolerable here given the manifest importance of the governmental interests at stake—interests that have been recognized by this Court as central to federal regulatory policies for the communications industry<sup>19</sup>—and the minimal intrusion on cable operators' editorial discretion resulting from the FCC's interim rules. As the court below conceded,<sup>20</sup> these rules are far less sweeping than those struck down in the *Quincy Cable TV* decision. They require cable operators to set aside a maximum of one-third of their channels for carriage of local television stations, leaving the cable operators broad discretion to carry other program services. They impose a viewing standard on commercial stations to qualify for mandatory carriage, thus ensuring that cable systems are not required to carry stations their subscribers have no interest in receiving. And by limiting the duration of the rules to five years—the minimum deemed necessary by the FCC to advance the purposes of the rules—the FCC has assured that whatever incidental effect they have on cable operators' editorial discretion will continue only as long as the rules are

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<sup>19</sup> See Section I *supra* and Section III *infra*.

<sup>20</sup> See *Century Communications*, 835 F.2d at 299 n.4 (J.A.16a-17a).

needed to protect substantial governmental interests. Thus, in crafting the rules, the FCC took great care to accommodate cable operators' First Amendment interests.

The court's decision, in contrast, reflects no similar accommodation of the other important governmental interests at stake. Indeed, in striking down the FCC's rules, the court scarcely considered the substantial governmental interests jeopardized by its decision.

### **III The Decision Below Will Jeopardize Important Governmental Objectives, Including Preservation of a Vital Public Television System.**

There is a compelling need for this Court to review the errors in the decision below because it frustrates fulfillment of important, longstanding governmental policies and injects the courts deeply into matters this Court has consistently maintained should be left primarily to the administrative agencies. As shown above, the Commission found that must-carry rules were necessary to maximize viewers' access to diverse programming services, foster a nationwide system of local television stations,<sup>21</sup> and assure an orderly transition from the cable environment that has existed for the last 20 years to one in which cable operators and local broadcasters compete for viewers. Given the control that cable operators presently exercise over the program sources available to their subscribers<sup>22</sup> and

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<sup>21</sup> *Report and Order* at ¶¶ 114-116, 160 (J.A. 93a-95a, 125a). These governmental interests are reflected in the FCC's statutory mandate set forth in Sections 151, 303(g) and 307(b) of the Communications Act of 1934, Pub. L. No. 98-214, 97 Stat. 1467 (1984), as amended, and Section 601 of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, added in 1984 as Title VI of the Communications Act.

<sup>22</sup> Although the court below criticized the FCC for its conclusions as to how long it will take cable subscribers to install A/B switches and antennas, it did not question the fact that cable systems currently control the programming made available to their subscribers.

the importance to local television stations of access to that audience, the decision below is likely to obstruct viewers' access to television program services and jeopardize the viability of local television stations licensed by the FCC pursuant to Section 307(b) of the Communications Act.

The court's decision places local public television stations in particular jeopardy. In adopting the must-carry rules, the Commission acknowledged the special governmental interest in ensuring viewer access to the services of public television stations<sup>23</sup>—a governmental interest that the court completely ignored. Congress and the FCC have long sought to foster a public television service that is not subject to the same market forces as commercial broadcasting and cable television. To this end, the FCC has reserved television channels for noncommercial use,<sup>24</sup> and Congress has appropriated funds—more than \$1.5 billion over the last twenty-five years—to support public broadcasting.

In adopting the Public Broadcasting Act of 1967,<sup>25</sup> Congress declared it federal policy to make available to "all citizens of the United States" public broadcasting services that are distinguished by their "diversity and excellence," and that are responsive to the interests of viewers in communities across the nation.<sup>26</sup> Public television has fulfilled the role envisioned for it, providing diverse, inno-

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<sup>23</sup> See *Report and Order* at ¶ 117 (J.A. 95a-96a); *Reconsideration Order* at n.31 (J.A. 245a).

<sup>24</sup> See *Sixth Report and Order on Television Assignments*, 41 F.C.C. 148 (1952).

<sup>25</sup> Pub. L. No. 90-129, 81 Stat. 365 (1967).

<sup>26</sup> Pub. L. No. 90-129, § 201, 81 Stat. 365, 368 (1967), codified at 47 U.S.C. § 396(a)(5) and (6) (1982). See also Public Telecommunications Financing Act of 1978, Pub. L. No. 95-567, 92 Stat. 2405; H.R. Rep. No. 1178, 95th Cong., 2d Sess. 2 (1978); S. Rep. No. 858, 95th Cong., 2d Sess. 6-7 (1978).

vative, quality program services unparalleled by any other program source.

The history of congressional and FCC commitment to public television, backed by federal appropriations, demonstrates that there is a substantial governmental interest in assuring the continued vitality of the nation's local public television stations. That interest is threatened by the court's invalidation of the FCC's must-carry rules. Public television stations must be able to reach their audiences if they are to continue to fulfill the mission envisioned by Congress, and cable carriage is essential to achieve that objective. Cable systems presently sit as gatekeepers to nearly 50 percent of the television homes in this country. Given the FCC's findings concerning cable subscribers' perceptions regarding access to television signals and their lack of the equipment necessary to receive those signals off-the-air, public television stations will not be able to reach a large portion of their audiences absent cable carriage.

The FCC's judgment that there is a substantial risk that cable systems will drop local television stations absent must-carry requirements has particular force with respect to public television stations. Congress and the Commission have fostered the development of public television to provide a noncommercial alternative to commercial television. Freed from the commercial imperative to maximize viewer ratings, public television's mission is to educate, enlighten, inform, and entertain; to provide programs that serve the needs of those who, for the most part, remain unserved by commercial television—children, the elderly, the handicapped, and ethnic and racial minorities; and to make available to every citizen the best our society has to offer in drama, music, dance, and the arts. Cable operators, on the other hand, are interested in offering programs with mass appeal and the greatest revenue potential. Given these differing motivations, there is a substantial risk that significant numbers of public television stations will not

be carried by their local cable systems, absent rules requiring such carriage.

Furthermore, cable carriage is generally more important to public television stations than commercial stations because more than 60 percent of public television stations operate in the UHF band, and virtually all public television stations that will be constructed in the future will be UHF.<sup>27</sup> As the Commission has recognized on numerous occasions, UHF television stations suffer from severe technical handicaps that hamper their ability to reach viewers in their service areas.<sup>28</sup> Thus, in many cases, cable carriage represents the only means for public television stations to deliver a technically acceptable signal to their audiences.

Finally, in addition to the adverse impact that the decision below will have on viewers' access to diverse program services and the viability of local television stations, the unreasonable burden of proof that the court placed on the Commission to justify cable carriage requirements effectively elevates the First Amendment rights of cable operators over those of the public and broadcasters, and limits dramatically the ability of the FCC to balance those interests under the regulatory scheme of the Communications Act. This Court has consistently held that the FCC has the power to regulate cable to achieve valid regulatory goals of the Communications Act,<sup>29</sup> and that "[b]alancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy

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<sup>27</sup> Over 90% of the remaining vacant channels reserved for public television are UHF. *Television Channel Utilization*, FCC Report, November 29, 1985, Table 1.

<sup>28</sup> See, e.g., *Report and Order* in Docket No. 78-391, 90 F.C.C.2d 1121, 1124-25 (1982); *Multiple Ownership Rules*, 57 R.R.2d 966, 980-81 (1985).

<sup>29</sup> See, e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

and difficulty" that is to be undertaken in the context of the Act. *Columbia Broadcasting Systems v. Democratic National Committee*, 412 U.S. 94, 101-02 (1973). The decision below imperils the FCC's ability to perform that difficult and critical balancing function.

In sum, the decision below jeopardizes achievement of policies central to federal regulation of the communications industry and necessitates this Court's review. Moreover, if not reversed, the decision will have an impact far beyond the communications industry, for it establishes an unprecedented standard for appellate review of administrative agencies' decisions where First Amendment issues are at stake. If left standing, the decision will hamper all agencies' efforts to fulfill their congressional mandates, deter them from fashioning prophylactic remedies to serious problems, and increasingly interpose the federal courts as regulators in place of the expert agencies established by Congress. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

For this reason, as well as the impact that the decision will have on viewers' access to diverse programming in general and on public television service in particular, the Court should grant this petition for certiorari.

### CONCLUSION

For these reasons, the Court should grant a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit in this case.

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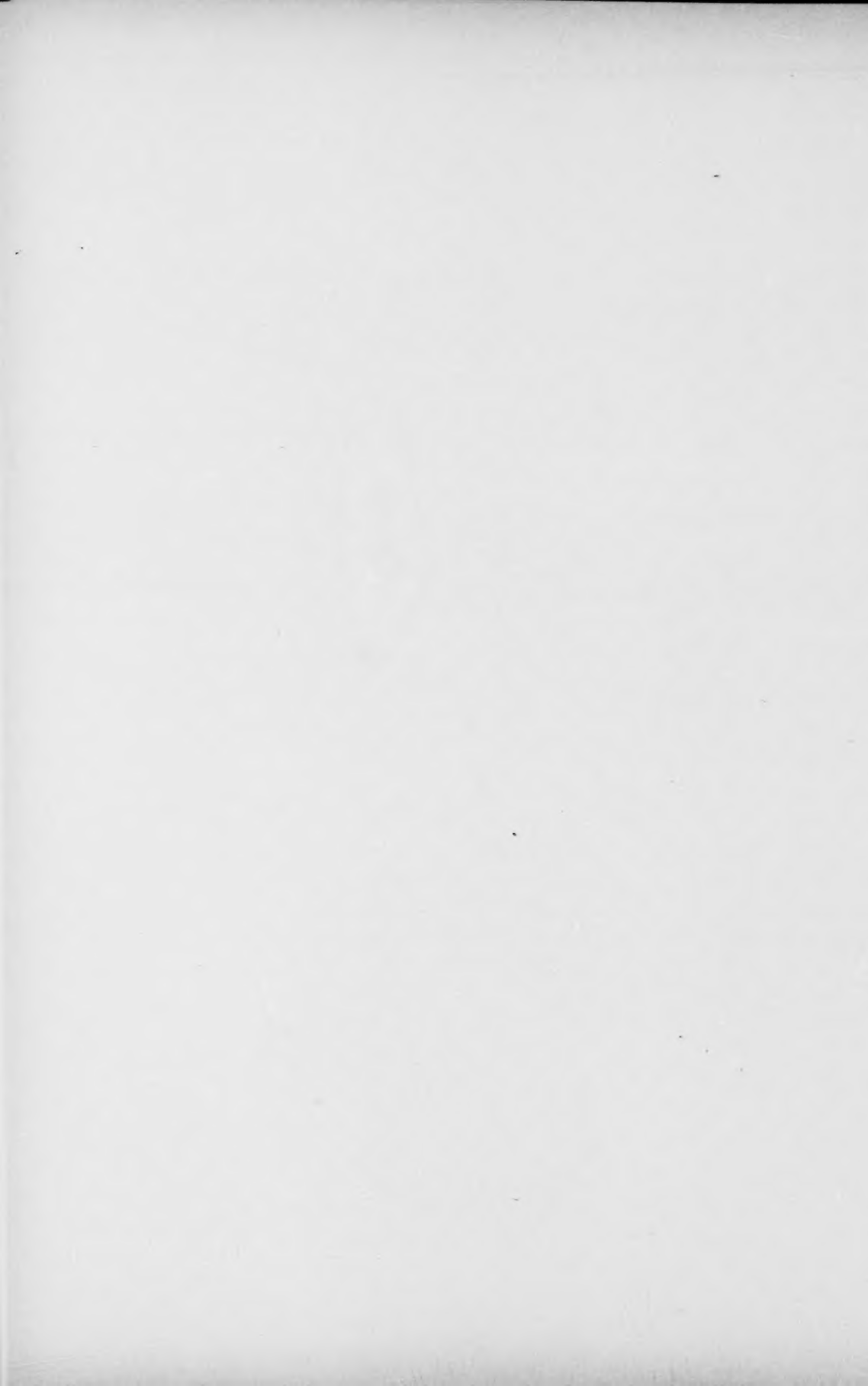
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March 10, 1988

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## STATUTORY APPENDIX



**§76.5 Definitions.**

(a) *Cable system or cable television system.* A facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (1) a facility that services only to retransmit the television signals of one or more television broadcast stations; (2) a facility that serves only subscribers in one or more multiple unit dwellings under common ownership, control or management, unless such facility or facilities uses any public right-of-way; (3) a facility of a common carrier which is subject, in whole or in part, to the provisions of Title II of the Communications Act of 1934, as amended, except that such facility shall be considered a cable system to the extent such facility is used in the transmission of video programming directly to subscribers; or (4) any facilities of any electric utility used solely for operating its electric utility systems.

NOTE: The provisions of Subparts D and F of this Part shall also apply to all facilities defined previously as cable systems on or before April 28, 1985.

(b) *Television station; television broadcast station.* Any television broadcast station operating on a channel regularly assigned to its community by § 73.606 of this chapter, and any television broadcast station licensed by a foreign government: *Provided, however,* That a television broadcast station licensed by a foreign government shall not be entitled to assert a claim to carriage or program exclusivity, pursuant to Subpart D or F of this part, but may otherwise be carried if consistent with the rules.

(c) *Television translator station.* A television broadcast translator station as defined in §74.701 of this chapter.

(d) *Qualified station,* (1) Any television broadcast station, as defined in §76.5(b), except where such station

would result in payment by the cable system of distant signal copyright fees, that with respect to a particular cable system:

(i) Is licensed to a community whose reference point, as defined in §76.53, is within 50 miles of the principal head-end of the cable system; and

(ii) If a commercial station, receives an average share of total Viewing hours of at least two percent and a net weekly circulation of at least five percent, as defined in §76.5(k), in noncable households in the county served by the cable system or has been operational less than one full year. For purposes of this section, a station is considered operational as of the date it initially commences operation under program test authority. Changes in station operations, for example, upgrade of facilities, transfer or assignment of license, or recommencement after operations have ceased, are not considered initial commencement of operations under this paragraph. The viewing standards of this paragraph shall not apply for one full year from June 10, 1987, to otherwise qualified stations that commenced operation after July 19, 1985, but before June 10, 1987 (the effective date of these rules). Once a commercial station has demonstrated that, on the basis of a full one-year survey season, it meets the viewing standard, it will be considered to have satisfied this standard for the remainder of the period until June 10, 1992. Provided, however, that at any time after one year from the date a commercial station demonstrates that it meets the viewing standard, a cable system may nullify the station's mandatory signal carriage eligibility if it demonstrates, using the methodology specified in Section 76.55 of this Part, that the station no longer meets the viewing standard.

(2) Any noncommercial educational television station's translator with 5 watts or higher power serving the cable community.

(3) A full service station or translator qualifies as a noncommercial educational station for purposes of these rules if it is licensed to a channel reserved for noncommercial educational use pursuant to §73.606 of this chapter. The Commission also will consider whether stations operating on nonreserved channels qualify as noncommercial educational stations on a case-by-case basis.

(e) *Grade A and Grade B contours.* The field intensity contours defined in §73.683(a) of this chapter.

(f) *Specified zone of a television broadcast station.* The area extending 35 air miles from the reference point in the community to which that station is licensed or authorized by the Commission. A list of reference points is contained in §76.53. A television broadcast station that is authorized but not operating has a specified zone that terminates eighteen (18) months after the initial grant of its construction permit.

(g) *Major television market.* The specified zone of a commercial television station licensed to a community listed in §76.51, or a combination of such specified zones where more than one community is listed.

(h) *Designated community in a major television market.* A community listed in §76.51.

(i) *Smaller television market.* The specified zone of a commercial television station licensed to a community that is not listed in §76.51.

(j) *Substantially duplicates.* Regularly duplicates the network programming of one or more stations in a week during the hours of 6 to 11 p.m., local time, for a total of 14 or more hours.

(k) *Significantly viewed.* Viewed in other than cable television households as follows: (1) For a full or partial network station—a share of viewing hours of at least 3 percent (total week hours), and a net weekly circulation of at least

25 percent; and (2) for an independent station—a share of viewing hours of at least 2 percent (total week hours), and a net weekly circulation of at least 5 percent. See §76.54.

NOTE: As used in this paragraph, “share of viewing hours” means the total hours that noncable television households viewed the subject station during the week, expressed as a percentage of the total hours these households viewed all stations during the period, and “net weekly circulation” means the number of noncable television households that viewed the station for 5 minutes or more during the entire week, expressed as a percentage of the total noncable television households in the survey area.

\* \* \*

(ee) *Cable system operator.* Any person or group of persons (1) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system; or (2) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

(ff) *System community unit: Community unit.* A cable television system, or portion of a cable television system, that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas).

(gg) *Subscribers.* A member of the general public who receives broadcast programming distributed by a cable television system and does not further distribute it.

(hh) *Cable service.* The one-way transmission to subscribers of video programming, or other programming service; and, subscriber interaction, if any, which is required for The selection of such video programming or other pro-

gramming service. For the purposes of this definition, "video programming" is programming provided by, or generally considered comparable to programming provided by, a television broadcast station; and, "other programming service" is information that a cable operator makes available to all subscribers generally.

\* \* \*

(jj) *Usable activated channels.* Channels engineered at the headend of the cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational, or governmental use but excluding channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations. See Part 76, Subpart K.

(kk) *Principal headend.* The location of the cable system equipment used to process the signals of television broadcast stations for redistribution to subscribers. Where more than one location meets the above definition, the cable operator shall designate a single location as the principal headend.

(ll) *Television survey season.* The twelve-month period beginning April 1 of one year and ending March 31 of the following year.

(mm) *Input selector switch.* Any device that enables a viewer to select between cable service and off-the-air television signals. Such a device may be more sophisticated than a mere two-sided switch, may utilize other cable interface equipment, and may be built into consumer television receivers.

**§76.55 Qualified television station; method to be followed for showings.**

A commercial television station shall demonstrate that, for the previous survey season, it meets the viewing stand-

ard specified in §76.5(d)(1)(ii) on the basis of an independent professional survey of noncable homes conducted according to the following provisions:

(a) If the station has been operational, as defined in §76.5(d)(1)(ii), for at least one complete television survey season, the survey shall cover four separate, consecutive four-week periods, including one in each of the four quarters of the survey season (i.e., April-June, July-September, October-December, January-March), and be conducted pursuant to the methodology used to compile Appendix B of the *Memorandum Opinion and Order on Reconsideration of Cable Television Report and Order*, FCC 72-530, 36 FCC 2d 326 (1972).

(b) If the station has been operational, as defined in §76.5(d)(1)(ii), for less than one complete television survey season, the survey shall cover a single period of at least two weeks. The survey sample shall be proportionally distributed among the noncable homes in the county served by the cable system and shall be of sufficient size to assure that the reported results are at least one standard error above the required viewing standard.

#### **§76.56 Mandatory carriage of television stations.**

(a) A cable system shall carry the signals of qualified television stations in accordance with the following provisions:

(1) A cable system shall carry the signals of qualified noncommercial educational television stations or translators of such stations, as follows:

(i) A cable system with fewer than 54 usable activated channels shall carry the signal of one qualified noncommercial educational station or translator;

(ii) A cable system with 54 or more usable activated channels shall carry the signals of two qualified noncommercial educational stations or translators.

(2) A cable system with 21 or more usable activated channels shall carry the signals of qualified television stations as follows:

(b) Where the number of qualified television station signals exceeds the number that a cable system is required to carry pursuant to paragraph (a) of this section, the cable system may select which of the signals to carry, *except that* carriage of qualified noncommercial educational station signals pursuant to paragraph (a)(1) of this section is nondiscretionary.

(c) In complying with the provisions of this section, a cable system shall be permitted but shall not be required to carry the signal of any qualified television station that:

(1) Substantially duplicates the signal of another qualified television station affiliated with a particular commercial national network;

(2) Fails to deliver to the cable system principal headend a picture of high quality providing enjoyable viewing and in which interference is no greater than just perceptible.

Note: In general, a signal level of -45 dBm for UHF signals and -49 dBm for VHF signals at the input terminals of the signal processing equipment would be needed to provide a picture of the required quality. Alternatively, a baseband video signal could be supplied.

(3) Is duplicated by another station that is carried; including where both a commercial parent station and its satellite station(s) qualify, and, in the case of noncommercial stations, where a parent station and its satellite and or translator station(s) qualify.

(d) A cable system shall not accept direct (monetary) payment or other indirect (nonmonetary) consideration in exchange for carriage of the signal of any qualified television station carried in fulfillment of mandatory signal carriage obligations, *except that* any such station may bear

any costs associated with delivering a good quality signal, as defined in paragraph (c) (2) of this section, to the cable system.

(e) A cable system shall identify on request those stations carried in fulfillment of its must carry signal carriage obligations.

\* \* \*

#### **§76.58 Disputes concerning carriage.**

(a) Any qualified television station not being carried may demand carriage from a cable system.

(b) As a prerequisite to a Commission decision concerning a television station's right to carriage, such demand shall be made in writing and shall include showings that:

(1) The station is a "qualified television station" as defined in §76.5(d);

(2) The cable system on which carriage is sought has not satisfied its carriage obligations under §76.56;

(3) To the extent that the matter is in dispute, the station delivers a good quality signal to the principal headend of the cable system pursuant to §76.56(c)(3).

(c) A cable system receiving a demand for carriage pursuant to this section shall respond in writing to the television station requesting carriage within fifteen (15) days of receipt of such demand. If the system declines to carry the station, the system's response shall state the reasons under the rules for such refusal.

Cable channels	TV signals	Cable channels	TV signals	cable channels	TV signals
21 - 29	7	62 - 65	16	98 - 101	25
30 - 33	8	66 - 69	17	102 - 105	26
34 - 37	9	70 - 73	18	106 - 109	27
38 - 41	10	74 - 77	19	110 - 113	28
42 - 45	11	78 - 81	20	114 - 117	29
46 - 49	12	82 - 85	21	118 - 121	30
50 - 53	13	86 - 89	22	122 - 125	31
54 - 57	14	90 - 93	23	above 125	25% of
58 - 61	15	94 - 97	24		capacity

(d) If no carriage agreement is reached between the parties, a ruling on the matter may be requested from the Commission. Such request shall contain a copy of the carriage demand, the response thereto, and any other information that may be considered relevant to a resolution of the question.

Pleadings responsive to such request may be filed within twenty (20) days. Initial requests and pleadings relating thereto shall be served on all parties to the proceeding. All factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them. An original and two (2) copies of the request and subsequent pleading(s) shall be filed.

(e) No cable system that, in refusing a carriage request, has complied in good faith with the mandatory signal carriage requirements of this chapter shall be subject to any forfeiture or penalty if it is later determined that the requesting station is entitled to carriage. If the Commission determines that the signal in question was or is entitled to carriage, the system shall commence such carriage within a reasonable period, to be specified by the Commission, and shall continue such carriage for at least twelve months.

(f) A cable system may be assessed a forfeiture or other penalty for failure to comply with a Commission order to carry a qualified broadcast station. Such Commission orders include action by the Chief of the Mass Media Bureau under delegated authority.

\* \* \*

**§76.60 Carriage of other television signals.**

(a) In addition to the qualified television station(s) carried pursuant to §76.56, a cable system may carry the signals of any other television stations, and also may carry the signals of any other television stations, and also may carry low power television stations, television translator stations, foreign television stations, satellite distributed program services, direct broadcast satellite stations and programming from any other sources.

(b) A cable system shall be permitted, but shall not be required, to carry any subscription television broadcast program or any ancillary service transmission on the vertical blanking interval or the aural baseband of any television broadcast signal including, but not limited to, multichannel television sound and teletext.

\* \* \*

**§76.62 Manner of carriage.**

(a) Where a qualified television broadcast signal is carried by a cable system in fulfillment of the mandatory signal obligations set forth in this part of the rules:

(1) the signal shall be carried in full, without deletion or alteration of any portion, except as required by this part;

(2) the signal shall be carried without material degradation.

(b) Where a broadcast television station carried in fulfillment of the mandatory signal carriage obligations is carried on a tier of service, all signals carried in fulfillment of those obligations must be carried on that tier; Provided, however, that a signal carried in fulfillment of mandatory signal carriage obligations may be placed on a tier of service, reception of which requires separate terminal device, if such devices are provided free of charge to all subscribers.

(c) All broadcast television stations carried in fulfillment of mandatory carriage obligations must be included on the lowest-priced tier of service separately available to each cable subscriber. The tier of service on which such stations are carried also must be accessible on additional receiver connections which the subscriber may purchase.

(d) Where a television broadcast signal otherwise is carried by a cable system pursuant to the rules in this part, programs broadcast shall be carried in full, without alteration or deletion of any portion, except as required by this part.

**§76.64 Expiration of mandatory carriage provisions.**

The provisions of §§76.56, 76.58, and 76.60, and 76.62(b) shall remain in force until January 15, 1992, and shall thereafter be of no further force or effect.